2002

# MFS Series Trust III (on behalf of MFS Municipal High Income Fund), Merrill Lynch High Yield Municipal Bond Fund, Inc., Muniholdings Fund, Inc., Merrill Lynch Municipal Bond Fund, the National Portfolio, Merrill Lynch Municipal Strategy Fund, Eaton Vance Distributors, Inc., T. Rowe Price Associates, Inc., John Hancock Funds, Inc., and Putnam Investments, Inc., v. Kenneth W. Winger, John r. Grainger, Paul R. Humphreys, James R. Bullock, John W. Rollins, Jr., John W. Rollins., Sr., Leslie W. Haworth, David B. Thomas, Jr., Henry B. Tippie, James L. Wareham, Grover C.

# Wrenn, Michael J. Bragagnolo, and Henry H. Taylor : Brief of Appellant

Utah Supreme Court



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**IN THE UTAH SUPREME COURT**

MFS SERIES TRUST III (on behalf of MFS MUNICIPAL HIGH INCOME FUND), MERRILL LYNCH HIGH YIELD MUNICIPAL BOND FUND, INC., MUNIHOLDINGS FUND, INC., MERRILL LYNCH MUNICIPAL BOND FUND, THE NATIONAL PORTFOLIO, MERRILL LYNCH MUNICIPAL STRATEGY FUND, EATON VANCE DISTRIBUTORS, INC., T. ROWE PRICE ASSOCIATES, INC., JOHN HANCOCK FUNDS, INC., AND PUTNAM INVESTMENTS, INC.,

Plaintiffs/Appellants,

v.

KENNETH W. WINGER, JOHN R. GRAINGER, PAUL R. HUMPHREYS, JAMES R. BULLOCK, JOHN W. ROLLINS, JR., JOHN W. ROLLINS, SR., LESLIE W. HAWORTH, DAVID B. THOMAS, JR., HENRY B. TIPPIE, JAMES L. WAREHAM, GROVER C. WRENN, MICHAEL J. BRAGAGNOLO, and HENRY H. TAYLOR,

Defendants/Appellees.

Supreme Court Case No: 20020719

**BRIEF OF APPELLANTS**

Appeal from Decision of
Third District Court, County of
Tooele

Case No: 01-0300722 MI
Judge: David S. Young


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## I. JURISDICTIONAL STATEMENT

Plaintiffs-Appellants MFS Series Trust III (on behalf of MFS Municipal High Income Fund), Merrill Lynch High Yield Municipal Bond Fund, Inc., Muniholdings Fund, Inc., Merrill Lynch Municipal Bond Fund, The National Portfolio, Merrill Lynch Municipal Strategy Fund, Eaton Vance Distributors, Inc., T. Rowe Price Associates, Inc., John Hancock Funds, Inc., and Putnam Investments, Inc. ("Plaintiffs-Appellants") are mutual funds or mutual fund managers who have collectively sued Defendants-Appellees, the former officers and directors of Safety-Kleen Corp., formerly known as Laidlaw Environmental Services, Inc., for violations of Utah's securities laws as well as common law fraud and negligent misrepresentation. Defendants-Appellees John R. Grainger, James R. Bullock, John W. Rollins, Jr., John W. Rollins, Sr., Leslie W. Haworth, David B. Thomas, Jr., Henry B. Tippie, James L. Wareham, Grover C. Wrenn, Michael J. Bragagnolo and Henry H. Taylor ("Defendants-Appellees") moved to dismiss Plaintiffs-Appellants' complaint (the "Complaint") for lack of personal jurisdiction. The trial court concluded that it lacked personal jurisdiction over Defendants-Appellees and dismissed the Complaint.

The Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. 1953 § 78-2-2(3)(j), as amended. The dismissal by the Third District Court of the Complaint with respect to Defendants-Appellees for lack of personal jurisdiction was certified as a final judgment under Rule 54(b) of the Utah Rules of Civil Procedure on August 6, 2002.

Plaintiffs-Appellants seek rescissory, compensatory, and punitive damages in an amount to be proved at trial, including treble damages pursuant to Utah Code Ann. § 61-1-22(2), together with appropriate pre-judgment interest on the purchase price of the Bonds described below at the maximum rate allowable by law. The total purchase price of the Bonds in 1997 was $45.7 million.

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS FOR REVIEW

The issue presented by this appeal is whether a Utah court may properly exercise personal jurisdiction over (a) a corporation's officers and directors who are alleged to be personally liable for violating Utah's securities laws, regardless of the officers and directors' states of residence, and (b) officers and directors who in person or through an agent transact business in this state giving rise to Plaintiffs-Appellants' claims. The issue stems from the trial court's granting of the collective motions by Appellees in the proceeding below to dismiss Plaintiffs-Appellants' Complaint for lack of personal jurisdiction.

The District Court made its ruling on personal jurisdiction based on documentary evidence alone. Hence, the Supreme Court may review the District Court's decision for "correctness." See Phone Directories Co., Inc. v. Henderson, 8 P.3d 256, 258 (Utah 2000) (citing Arguello v. Industrial Woodworking Mach. Co., 838 P. 2d 1120, 1121 (Utah 1992)). "Because the propriety of a motion to dismiss is a question of law," the Utah Supreme Court "review[s] for correctness, giving no deference to the decision of the trial court." Wagner v. Clifton, 62 P.3d

440, 441 (Utah 2002).

On September 4, 2002, Appellants filed a timely notice of appeal preserving this issue. (RA 0559-0552).

## III. STATEMENT OF THE CASE

### A. Nature of the Case and Procedural History.

This action arises out of the issuance (the "Issuance") by Tooele County of Pollution Control Refunding Revenue Bonds ("the Bonds") on July 1, 1997, secured by a loan agreement (the "Loan Agreement") between the County of Tooele (the "Issuer" or the "County") and Laidlaw Environmental Services, Inc. ("LES" or "the Borrower") and its successor-entity, Safety-Kleen Corporation ("Safety-Kleen" or "the Company"). (RA 022, 020)[1].

In April/May 1998, LES, which had been a partially-owned subsidiary of Laidlaw, Inc. ("Laidlaw"), merged with and assumed the name of Safety-Kleen Corporation. (RA 020, 017). Safety-Kleen, as successor-entity to LES, then assumed the obligations under the loan securing the securities at issue.

Appellants, in purchasing the Bonds, relied on a series of financial statements of LES incorporated by the offering documents underlying the Issuance, including quarterly and annual statements of LES' financial performance through July 1997. (RA 06, 012, 011). These financial statements were later admitted by the Company to contain material misstatements and fraudulently

[1] "RA" refers to the record on appeal, prepared and paginated by the Clerk of the Third District Court, Tooele County in accordance with Rule 11 of the Utah Rules of Appellate Procedure.

reported revenue, resulting in the Bonds' plummet in value and the termination of several of the Company's officers. In sum, the principal officers of the Company, including Paul R. Humphreys ("Humphreys"), Bragagnolo, and Kenneth W. Winger ("Winger") oversaw a massive fraud in the debt and assets reporting structure of the Company, resulting in an overstatement of what the Company has admitted to be over half a billion dollars in revenues from the beginning of fiscal year 1997 (which began on August 31, 1996, or nearly one year prior to the Issuance) until 1999. (RA 017-011, 0744, 0610-0606)[2].

Appellants brought suit in Tooele County on July 1, 2001, to recover their losses under Utah's securities laws, as well as under common law theories of fraud and negligence. (RA 023-01). At the heart of the Complaint were the very "accounting irregularities" referred to in the Company's press releases, resulting in material misrepresentations of the Company's financial performance and hence the true value of the securities offered in the Issuance. (RA 017-011).

Defendants-Appellees moved to dismiss the Complaint for lack of personal

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[2] RA 0579-0754 consists of, inter alia, Plaintiffs' Opposition to Defendants' Motions to Dismiss the Complaint for Lack of Personal Jurisdiction, along with attached exhibits, originally filed and served on February 22, 2002. These materials appear out of sequence chronologically in the Record on Appeal because they were at first inadvertently omitted by the trial court from the Record on Appeal. The trial court ordered that these materials be appended to the Record on Appeal on April 14, 2003. See RA 0581-0580 and Amended Index of Record on Appeal.

jurisdiction.[3] (RA 0312, 0181, 098, 041). None of the Appellees claimed that the service of process or notice of the Complaint itself was defective, but rather argued that the trial court lacked personal jurisdiction over them on constitutional grounds. (RA 091-085, 0161-0140, 0306-0290, 0318-0317). Immediately after oral argument on May 13, 2002, the trial court indicated that Defendants' motions would be granted, (RA 0578, p. 20) and an order dismissing the Complaint was entered on June 19, 2002. (RA 0517).

Plaintiffs-Appellants filed their first notice of appeal on July 18, 2002. (RA 0524-0519). Since the Order of Final Judgment on the trial court's dismissal was not entered until August 6, 2002, however, Plaintiffs-Appellants were required to file another notice of appeal and dismiss the previous appeal, which had been assigned Supreme Court Case No. 20020617. (RA 0555). On September 4, 2002, Appellants filed a timely notice of appeal giving rise to the present appeal, which was assigned Supreme Court Case No. 20020719. (RA 0559-0552).

**B. Facts Relevant to Issues Presented for Review.**

1. This action arises out of the Issuance of the Bonds on July 1, 1997, secured by the Loan Agreement pursued by LES and its successor-entity, Safety-Kleen. (RA 022, 020).

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[3] Appellees filed four separate motions on January 22, 2002, either collectively or individually, as follows: on behalf of David E. Thomas, Jr., John W. Rollins, Jr., John W. Rollins, Sr., James L. Wareham, Grover C. Wrenn, and Henry B. Tippie (RA 098); on behalf of James R. Bullock, John R. Grainger, and Leslie W. Haworth (RA 041); on behalf of Henry H. Taylor (RA 0181); and on behalf of Michael Bragagnolo (RA 0312).

2. The costs of the Issuance were paid by LES. See Preliminary Offering Memorandum dated June 23, 1997 ("Offering") (RA 0746, 0647-0646)[4].

3. According to the Loan Agreement (RA 0643-0610), LES itself "requested that the County issue" the Bonds in order to refund and retire an earlier bond issuance and to continue financing "the costs of acquisition and construction by the Borrower [LES]" of a "Project." This Project consisted of constructing and operating "certain hazardous waste disposal facilities in the County." (RA 0639).

4. The $45.7 million "Project" was "owned by the Borrower [LES]." Id. (emphasis added).

5. According to the Offering, the Bonds were to be "limited obligations" of the County, and "payable solely from and secured by a pledge of the revenues to be derived pursuant to [the] loan agreement" between the County and LES. This Loan Agreement – between the Borrower and the County – was entered into in this State, and by its own terms is governed by Utah law. (RA 0615).

6. The Loan Agreement was signed on behalf of LES by defendant

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[4] The trial court inadvertently failed to paginate alternate pages of a double-sided document which originally appeared as Exhibit A in support of Plaintiffs' Opposition to Defendants' Motions to Dismiss for Lack of Personal Jurisdiction. (See RA 0717-0644 and alternating pages). RA 0754-0579, of which these pages are a part, were not made a part of the Record on Appeal until April 13, 2003, and were not produced to Appellants until April 17, 2003, therefore not permitting enough time for the trial court to correct the error before Appellants' opening brief was due. Therefore, where Appellants need to cite to text appearing on a page which was not assigned a page number by the trial court, Appellants herein will cite the page numbers between which the cited text may be found.

Paul Humphreys, acting as Senior Vice-President and Chief Financial Officer of LES, and attested to by defendant Henry Taylor, acting as Vice-President, General Counsel and Secretary of LES. (RA 0613). The Issuance was valued at $45.7 million. (RA 0645-0644; See FN 4).

7. For the benefit of potential purchasers, the Offering incorporated directly or by reference numerous financial statements from portions of the fiscal year ending August 31, 1997, containing SEC filings and pro forma financial either consisting solely of or incorporating LES' financial results, which were later withdrawn and admitted by the Company to contain material misstatements.[5] (RA 012).

8. Appellants are institutional purchasers who purchased and held the Bonds on behalf of themselves or various mutual funds. (RA 021).

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[5] The financial reports at issue are recited in the Complaint and include, inter alia, Laidlaw, Inc.'s Quarterly Report on Form 10-Q for the first quarter ended November 30, 1996; Laidlaw, Inc.'s Quarterly Report on Form 10-Q for the second quarter ended February 28, 1997; LES' Reports on Form 8-K dated May 30, 1997 and June 11; Pro Forma Condensed Combined Summary Financial Data for Rollins Environmental Services, Inc. and Laidlaw Subsidiaries (including LES) for the six months ended February 28, 1997; Pro Forma Combined Financial Statements and Statement of Operations for Rollins Environmental Services, Inc. and Laidlaw Subsidiaries for the six months ended February 28, 1997; Laidlaw Hazardous Waste Services Management's Discussion and Analysis of Financial Condition and Results of Operations for the six months ended February 28, 1997; Laidlaw Hazardous Waste Services Combined Statements of Income for the six months ended February 28, 1997; and Laidlaw Hazardous Waste Services Combined Statements of Cash Flows for the six months ended February 28, 1997. Laidlaw, Inc.'s Quarterly Reports incorporated financial statements from its subsidiaries, including LES. (RA 012-011).

9. Under the heading "Notice to Investors," the Offering provided that "[e]ach initial purchaser ha[d] been provided with access to such financial or other information as it has requested in connection with its decision to purchase any Bonds." (RA 0745). According to the Offering, the "Company ha[d] [further] covenanted for the benefit of the holders and beneficial owners of the Bonds to provide certain financial information and operating data relating to the Company by not later than 180 days following the end of the Company's fiscal year." (RA 0745, 0655).

10. The Proposed Form of Continuing Disclosure Agreement, incorporated as Appendix C to the Offering, further stated that the content of such disclosure "shall contain or incorporate by reference...a copy of [the Company's] annual financial statements prepared in accordance with generally accepted accounting principles," and that this agreement would also be governed by Utah law. (RA 0716-0714).

11. LES changed its name to Safety-Kleen Corporation on November 25, 1998, after acquiring all of the outstanding capital stock of the former Safety-Kleen Corporation and replacing the entire board of the old Safety-Kleen with the directors of LES. (RA 020).

12. Less than three years after the Issuance, the Company announced that its previously reported financial statements for the fiscal years ending August 31, 1999, 1998 and 1997 – thereby including several quarters leading up to the time of the Issuance, when it was operating as LES – had been materially

misstated, and would be withdrawn. (RA 017). The Company also placed its three top executives – including Bragagnolo, Humphreys, and Winger – on leave while the Company investigated the extent to which the financials would need to be restated as a result of the Company's "accounting irregularities." (RA 012). These three executives later resigned. Id. The value of the Bonds plunged almost immediately after the Company's announcement, and since have been rendered valueless. (RA 011).

13. Winger and Humphreys have not Answered or otherwise responded to the Summons served on them on October 29 and 30, 2001, respectively, and are therefore not parties to this appeal. (RA 0744).

14. On July 9, 2001, or over one week after the filing of the Complaint in this action, the Company finally issued its restated financials for fiscal years 1997 through 1999, as well as the first quarter of 2000, announcing "an overall reduction in previously reported earnings of approximately $534 million for fiscal years 1997-1999, and a loss of approximately $833 million in fiscal year 2000." (RA 0610-0608).

15. The restatements were made necessary, in the words of Defendant David E. Thomas, Jr., due to "unfortunate... accounting irregularities" which took place during fiscal years 1997-1999. Id. These accounting irregularities are detailed in the Complaint (RA 017-011), and remain completely uncontroverted by Defendants-Appellees.

16. Further, by definition (Accounting Principles Board Opinion No.

20), a restatement of financial statements means that those financial statements when issued were materially false. (RA 010).

17. At the time the Bonds were issued, LES was a partially-owned subsidiary of Laidlaw, Inc. ("Laidlaw"). (RA 020). On June 24, 2001, or approximately one week prior to the filing of this action, Laidlaw filed for Chapter 11 bankruptcy protection. Hence, Laidlaw is not named as a defendant in this case. Id. Safety-Kleen, the successor entity to LES, filed a bankruptcy petition over one year earlier, on June 9, 2000, and hence is also not named as a defendant in this case. (RA 021).

18. In the offering papers touting the Issuance, LES identified its "Executive Officers and Directors" as consisting of, among others, Appellees Michael Bragagnolo ("Bragagnolo"), Henry H. Taylor ("Taylor"), James R. Bullock ("Bullock"), John R. Grainger ("Grainger"), Leslie W. Haworth ("Haworth"), John W. Rollins, Sr. ("Rollins, Sr."), John W. Rollins, Jr. ("Rollins, Jr."), David B. Thomas ("Thomas"), Henry B. Tippie ("Tippie"), and James L. Wareham ("Wareham").[6] (RA 0682).

19. Defendants Haworth, Tippie, and Wareham (two of whom are self-identified in their moving papers as "Outside Director Defendants") are in fact further identified as "Audit Committee Members," "responsible for," inter alia,

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[6] Respondent Grover C. Wrenn ("Wrenn") has been an officer or director of the Company since July 1997, or starting shortly after the Issuance. (RA 0175). As such, statutory liability may not attach to Wrenn under the Utah securities laws. Appellants thus do not resist Wrenn's motion.

"the oversight of the Company's financial reporting process and internal controls" as well as "considering major changes and major questions of choice regarding appropriate auditing and accounting principles and practices to be followed when preparing corporate financial statements." (RA 0683, 0682).

20. Each of the Appellees, with the exception of Wrenn, admit to being officers or directors of the Company at the time of the Offering. (See Defendants' Affidavits at RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177).[7]

21. Each of the Appellees resides outside of Utah. Id.

22. The foregoing facts were uncontested by Defendants-Appellees in their Affidavits. Id.

## IV. SUMMARY OF ARGUMENTS

As set forth above, the issue raised in this appeal is whether a Utah court may properly exercise personal jurisdiction over a corporation's officers and directors who, through their action or inaction having effects in this state, are alleged to be personally liable for violating Utah's securities laws.

Sections 61-1-1 et seq. of the Utah Annotated Codes regulate the offer and sale of securities in this state. Section 61-1-22(4) explicitly provides for the joint and several liability of directors and officers of a person or entity that may be held

[7] "Defendants' Affidavits" refers to the Affidavit of Henry B. Tippie; Affidavit of David E. Thomas, Jr.; Affidavit of John W. Rollins, Jr.; Affidavit of James L. Wareham; Affidavit of Grover C. Wrenn; Affidavit of Henry B. Tippie; Affidavit of Henry H. Taylor; Affidavit of James R. Bullock; Affidavit of John R. Grainger; Affidavit of Leslie W. Haworth; Affidavit of Michael Bragagnolo.

liable under the securities laws, and shifts the burden onto these individuals to prove as a matter of law their lack of knowledge or reason to know of the facts giving rise to the liability of the person or entity they are presumed to have controlled. See Utah Code Ann. § 61-1-22(4). For the purposes of establishing liability, then, Utah's securities statutes presume that corporate officers and directors have undertaken actions (or actionable inaction) having effects in the state of Utah, absent a showing by the same corporate officers and directors that they did not know or could not reasonably have known of the facts giving rise to the liability of the corporation or agents they are presumed to have controlled. Utah's long arm jurisdiction statute specifically provides for personal jurisdiction over out-of-state actors whose activities "affect persons or businesses within the state of Utah." See Utah Code Ann. §§ 78-27-24, 78-27-23. Additionally, where personal service is otherwise impossible to obtain, Utah has enacted a fail-safe method of both serving process on and obtaining personal jurisdiction over individuals such as Appellees. See Utah Code Ann. § 61-1-26. The trial court below, however, failed to correctly apply Utah law in its jurisdictional analysis. For the reasons discussed below, Utah may properly exercise personal jurisdiction over Appellees, and their collective motions to dismiss the Complaint should be denied.

## V. ARGUMENT

Under Utah law, a three-part inquiry is used to determine whether a court may exercise specific personal jurisdiction over a defendant. These parts include

(a) that the defendant's acts or contacts implicate Utah under the Utah long-arm statute; (b) that a "nexus" exists between the plaintiffs' claims and the defendant's acts or contacts; and (c) that the application of the long-arm statute does not offend due process. Harnischfeger Engineers, Inc. v. Uniflo Conveyor, Inc., 883 F. Supp. 608 (D. Utah 1995) (superseded by statute on other grounds). Upon application of these criteria, a Utah court may exercise specific jurisdiction over each of the Appellees.

### A. Legal Standards.

Under Utah's long-arm statute, Courts may "assert jurisdiction over non-resident defendants to the fullest extent permitted" by the due process clause of the U.S. Constitution. SII Megadiamond, Inc. v. American Superabrasives, Corp., 969 P.2d 430 (Utah 1998) (citing Utah Code Ann. § 78-27-22)). The Utah Supreme Court has, in its own words, "explicitly upheld that policy." Id. (citing Synergistics v. Marathon Ranching Co., 701 P.2d 1106 (Utah 1985)). Under the federal Constitution's due process clause, a court may assume jurisdiction over a nonresident defendant when the defendant has constitutionally sufficient "minimum contacts" with the forum state. See Neways, Inc. v. McCausland, 950 P.2d 420, 423 (Utah 1997) (citing Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (Utah 1978)). Section 78-27-24 permits the exercise of personal jurisdiction over "any person...whether or not a citizen or resident of this state, who in person or through an agent does any" of a number of acts, including, inter alia, "the transaction of any business within this state," "the ownership, use,

or possession of any real estate situated in this state," and "contracting to insure any person, property, or risk located within this state at the time of contracting." Utah Code Ann. § 78-27-24 (emphasis added). The "transaction of business" within this state is defined as "activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." Harnischfeger Engineers, Inc., 883 F. Supp. at 612 (citing Utah Code Ann. § 78-27-23). A person may hence transact business within the state even if they are not physically present in Utah. Id.

Personal jurisdiction may be "general" or "specific." (Perkins v. Benguet Mining Co. (1952) 342 U.S. 437). Appellants in this case argue that specific personal jurisdiction obtains over Appellees. Specific personal jurisdiction arises over a non-resident defendant who "has only minimum contacts with the forum but only [as to] claims arising out of [the] defendant's forum-state activity." Neways, 950 P.2d at 423; see also Burger King Co. v. Rudzewicz, 471 U.S. 462, 472-73 (1985).

Courts addressing a motion to dismiss a complaint for lack of personal jurisdiction must take care to avoid resolving the merits of the controversy. When a question of personal jurisdiction is to be resolved on documentary evidence, "the plaintiff is only required to make a prima facie showing of personal jurisdiction." Neways, 950 P.2d at 422 (citing Anderson v. American Society of Plastic Surgeons, 807 P.2d 825 (Utah 1990)). A prima facie showing requires "the establishment of a legally required rebuttable presumption...[or] [t]he plaintiff's

production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the plaintiff's favor." Black's Law Dictionary 498 (West Pocket Ed. 1996). In determining this, "[t]he plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions." Neways, 950 P.2d at 422 (emphasis added); Cf. Roskelley & Co. v. Lerco, Inc., 610 P.2d 1307, 1310 (Utah 1980) (holding plaintiff would need to rebut affidavit by defendant which "specifically contradict[ed]" plaintiff's allegations). The Utah Supreme Court has held that a defendant must "specifically controvert" a plaintiff's allegations by affidavit in order for the Court not to automatically regard the plaintiff's allegations as true. Anderson, 807 P.2d at 827 (emphasis added). Further, unless an evidentiary hearing is held, a plaintiff must only prove jurisdiction by a preponderance of the evidence at trial; prior to trial, plaintiff must simply state a prima facie case for jurisdiction. Id.

Where there remain disputes in the documentary evidence offered by the parties, and particularly where defendants fail to specifically contest a jurisdictional claim, "any [such] disputes...are resolved in the plaintiff's favor." Neways, 950 P.2d at 422; Anderson, 807 P.2d at 827.

Appellants specifically alleged that Appellees, who, under Utah Code Ann. § 61-1-22(4) either knew or should have known of the facts giving rise to the underlying securities violations by LES and its agents, were liable as controlling persons of individuals or entities liable under Utah Code Ann. § 61-1-1(2). (RA 09-07). Section 61-1-22(4) provides that, inter alia,

> (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Utah Code Ann. § 61-1-22(4) (emphasis added). By its plain language, this statute imposes personal liability on directors and officers of an entity liable under section 61-1-1(2) unless they establish that they were unaware of and had no reasonable grounds to believe in the existence of the facts giving rise to liability. Id.

Plaintiffs-Appellants argued that absent the required showing by the Defendants-Appellees under section 61-1-22(4) that they did not and could not have known of the facts giving rise to liability both of the selling entity and several of the officers and directors under section 61-1-1(2), Defendants-Appellees were presumed to have undertaken acts which, having effects in the state of Utah, are sufficient to confer personal jurisdiction over them. (RA 0578, p. 16; RA 0731-0728). Such acts include but are not limited to controlling, managing or directing LES and its agents to make material misstatements in connection with the sale of securities in violation of section 61-1-1(2). Id.

Defendants-Appellees did not make the required showing under section 61-

1-22(4) that they did not know or could not reasonably have known of the facts giving rise to violations of section 61-1-1(2) by LES or its agents. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177). Rather, Defendants-Appellees, relying on cases which did not implicate the specific language of section 61-1-22(4), argued generally that there is no per se rule of "vicarious" liability of officers and directors of a corporation against whom common law fraud or negligence is alleged, and that the court could not obtain personal jurisdiction over such officers and directors based on their mere status as officers and directors alone. (See, e.g., RA 0146-0145, 0297-0296) (citing, e.g., Ten Mile Indus. Park v. Western Plains Serv. Corp., 810 F. 2d 1518, 1527 (10th Cir. 1987); SII Megadiamond, Inc., 969 P.2d at 430). In effect, Defendants-Appellees argued, and the trial court agreed, that notwithstanding the clear statutory language of section 61-1-22(4) setting the burden of proof on the corporate officers and directors to show that they did not or could not have known of the facts giving rise to liability under Utah's securities laws, Plaintiffs-Appellants were required to set forth some affirmative culpable conduct on the part of those officers and directors in the state of Utah in order to establish personal jurisdiction over them. This result conflicts squarely with the language and intent of section 61-1-22(4). Section 61-1-22(4) provides for personal liability of the individuals who control and direct the commission of securities violations, and thereby the personal (rather than "vicarious") commission of "tortious acts" in or causing effects in Utah.

### B. Appellants' Factual Allegations and Claims for Relief Under Utah's Securities Laws Establish That Appellees Committed a Tort Within or Caused Effects in Utah.

There are three basic facts which are grounds for personal jurisdiction in this instance that are undisputed: (1) securities were issued or caused to be issued in Utah by LES; (2) these securities were offered and sold to Appellants by way of false or misleading statements; and (3) Appellees were directors and officers of LES at the time of the Issuance. (RA 026-01, 0747-0742). In this case, Appellants' as-pleaded legal and factual claims, along with the specific language of the statutes cited, together work to confer personal jurisdiction over Appellees in Utah. In short, Appellees bear the burden of proving that they are not liable as control persons under the Utah securities laws. Absent doing so – involving factual inquiry which would be premature at this stage of the proceedings – Defendants-Appellees must be presumed to have committed knowing acts within or having effects in Utah, including but not limited to directing LES' activities in connection with the Issuance. Sections 61-1-22(4) and 61-1-26 make this far from an anomalous or unexpected result, given the precise language of these statutes, as well as the sheer prevalence of nearly identical provisions adapted from the Uniform Securities Act among the "Blue Sky Laws" of the various states. See discussion at Section V.C, infra; see also Uniform Securities Act §§ 605, 606 (1985) (amended 1988). As such, personal jurisdiction over these Appellees in Utah is proper, and Appellees' motions to dismiss the Complaint should be denied.

### 1. The Utah Securities Statutes Provide For the Personal Liability of Corporate Officers and Directors Unless They Had No Knowledge of or Reason to Know of the Securities Violations.

As the self-described "Executive Officers and Directors" of LES at the time of the Issuance[8], Appellees are presumptively jointly and severally liable for violations of Utah's securities laws arising from the issuance of securities initiated by LES.[9] (RA 0682). This liability attaches without affirmative proof by Plaintiffs-Appellants of the Defendants' culpable conduct or participation in the alleged fraud. See Steenblik v. Lichfield, 906 P.2d 872, 876 (Utah 1995) (holding that the Utah securities laws "expressly impos[e]... liability on every partner, officer, director, or the like" and that "[t]he plaintiff need not demonstrate that such a person was able to control the transaction" in order to establish liability) (emphasis added).

Section 61-1-1 of the Utah Code provides:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:
> (1) employ any device, scheme, or artifice to defraud;
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
> (3) engage in any act, practice, or course of business

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[8] Minus Wrenn (see FN 6).

[9] As noted above, Appellants have also pleaded violations of common law fraud and negligent misrepresentation, along with direct violations of Utah Code Ann. § 61-1-1(2), against Appellees.

> which operates or would operate as a fraud or deceit upon any person.

Utah Code Ann. § 61-1-1. Section 61-1-22 provides plaintiffs with civil remedies, including damages and/or rescission, against persons or entities liable under Section 61-1-1(2). Utah Code Ann. § 61-1-22(1). Section 61-1-22(4), as stated above, provides for the joint and several liability of "every officer or director" of a person or entity so liable, unless these individuals meet their burden of proving that they "did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." Utah Code Ann. § 61-1-22(4).

As set forth supra, the Issuance underlying Plaintiffs-Appellants Complaint originated in Utah, and was initiated by LES to finance the construction of several hazardous waste facilities in Utah. (RA 0639). LES incorporated financial statements in the offering documents, relied upon by Appellants, which subsequently by the Company's own admission suffered from material misstatements caused by "accounting irregularities." (RA 017, 0610-0608). Appellants set forth in the Complaint that liability under Utah's securities laws could attach to LES. (RA 09).

Appellants thus have alleged facts sufficient to state a claim against LES under Utah Code Ann. §§ 61-1-1(2) and 61-1-22(1). It follows that they have also alleged facts sufficient to state a claim against Appellees as control persons under

section 61-1-22.[10] See Steenblik, 906 P.2d at 876. Other states interpreting statutes identical to Utah Code Ann. § 61-1-22(4) agree. See, e.g., Kamen v. Lindly, 94 Cal. App. 4th 197, 204 (2001) (noting that Cal. Corp. Code § 25504 "specifically impose[s] liability not only on the buyer or seller of a security but on controlling persons...as well as aiders and abettors...[thus] indicat[ing] that the Legislature knows how to establish secondary liability when it wants to do so").

### a. Other States Agree On Their Interpretation of Analogous Control Person Provisions.

States which, like Utah, have enacted provisions borrowed from the Uniform Securities Act and directly analogous to Utah Code Ann. § 61-1-22(4) have held that the straightforward language of these statutes provides a presumption of the knowing commission of a tort by the officers and directors of an entity liable for securities fraud.

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[10] It is not necessary for Appellants to have actually pursued LES as a defendant in order to seek recovery against Appellees as jointly and severally liable parties. It is well established in the securities context that injured parties may seek recovery from persons or entities who may be jointly and severally liable with an absent party, particularly when the absent party is bankrupt. Courtney v. Waring, 191 Cal. App. 3d 1434, 1441 (1987) (holding that courts have "consistently rejected" arguments shielding "secondary parties" from liability when "the literal seller" of securities has never been held liable or has been voluntarily dismissed from the lawsuit). Indeed, in such instances, "[i]t is established that the plaintiff need not proceed against the principal perpetrator, nor need the principal perpetrator be identified in the complaint." Securities and Exchange Com'n v. Savoy Industries, 587 F.2d 1149, 1170 n. 47 (D.C. Cir. 1978). This policy seeks to prevent "officers and directors of a bankrupt corporation whose actions are alleged to have contributed to that condition" from "avoid[ing] ... possible ... liability by asserting the lack of a prior adjudication against the controlled person as a basis for dismissal." Courtney, 191 Cal. App. 3d at 1442 (citing Briggs v. Sterner, 529 F. Supp. 1155, 1171 (S.D. Iowa 1981)).

In Goelitz v. Lathrop et al., 3 N.E. 2d 305 (Ill. App. Ct. 1936)), the court analyzed the language of a statute analogous to section 61-1-22(4) and observed:

> When the act was amended to include "officers and directors of the seller," in our opinion, they were not only placed in the same grammatical category "as the seller," but we think that it was contemplated that liability should attach to them in the event of the sale of stock in violation of the Blue Sky Law by reason of their presumed knowledge of such sale.

Id. at 314. The Court continued "[i]f it had been the purpose of the Legislature to simply add 'the officers and directors of the seller' to the group...who could only be held liable if they had 'knowingly performed any act or in any way furthered such sale,' it would have been an easy matter to have had the statute...[further] amended" to read that way. Id. By shifting the burden of proof on the officers and directors state of knowledge to those officers and directors, the statute "cure[d] what had been discovered by experience to be a fatal weakness" of the alternative which had "afforded officers and directors of corporations whose securities were illicitly sold an avenue of escape from liability on the pretext of ignorance" of the particular violation. Id. at 315; see also Boddy v. Theiling, 129 Ga. App. 273 (Ga. App. 1973) (holding director's "do-nothing defense is not legally sufficient" to defeat plaintiff's claim).

Utah's section 61-1-22(4) has been written even more broadly, requiring officers and directors of a violating entity to prove their lack of knowledge of "the existence of facts by reason of which the liability is alleged to exist." Utah Code Ann. § 61-1-22(4). In the present instance, such language necessarily

encompasses not only the facts pertaining simply to the Issuance itself, but also to the accounting irregularities which took place giving rise to the material misrepresentations incorporated in the offering documents accompanying the Issuance.

### 2. Closely Analogous State and Federal Provisions Have Been Held to Require Defendants to Bear the Burden of Proof Against the Presumption of Liability as Control Persons.

Though there are few decisions in Utah directly discussing presumptive liability under section 61-1-22(4), other state courts have been perfectly clear in their reading of the identically-worded "secondary liability provisions" of similar laws. See, e.g., Courtney v. Waring, 191 Cal. App. 3d 1434, 1440 (1987) (citing West's Ann. Cal. Corp. Code § 31302). One California Court of Appeal noted that California's version of section 61-1-22(4), Cal. Corp. Code § 25504, "is the securities law analog of section 31302 in the Franchise Investment Law." Id. (citing 1 Marsh & Volk, Practice Under the California Securities Laws (rev. ed. 1986) § 14.03[4][b], pp. 14-21).

The relevant language from Cal. Corp. Code § 31302 states as follows:

> Every person who directly or indirectly controls a person liable under Section 31300 or 31301, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, [and] every person occupying a similar status or performing similar functions ... are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the

> existence of facts by reason of which the liability is alleged to exist.

Cal. Corp. Code § 31302.

Section 31302 has been read by the California courts to require precisely what Appellants assert is required in the present instance: proof, by Defendants-Appellees, of their lack of knowledge or reasonable grounds to believe in the facts by which the underlying securities fraud is alleged to have arisen. See Eastwood v. Froelich, 60 Cal. App. 3d 523, 530-53 (1976). "Lack of knowledge or reasonable grounds to believe is an exemption to the liability imposed on corporate officers [by the securities laws]...the burden of proof rest[s] upon [the officers] to invoke the exemption." The Neptune Society Corporation, et al. v. Longanecker, 194 Cal. App. 3d 1233, 1248 (1987) (emphasis added). Since the relevant officer in Neptune Society had failed to meet this burden, the court affirmed judgment against her even though the record purportedly was "completely silent on [the defendant's] knowledge or involvement in the...issue altogether." Id. In Courtney v. Waring, plaintiffs had sought recovery from two vice-presidents and a director of an entity not named in the complaint but yet purportedly liable under section 31201 of the California Corporations Code. Courtney, 191 Cal. App. 3d at 1440. Holding that "while factual questions may arise as to the defendants' status," the court held that where, under the plain language of the statute, "each of the defendants [fell] within one of the statutory categories...the complaint adequately plead[ed] a cause of action under section

31302" and that, as such, "defendants [were] properly subject to suit." Id. (emphasis added).

Ten years earlier, a California appellate court observed that section 31302, containing language "mainly lifted from section 25504 of the Corporations Code," mandated that "[t]hose claiming the exemption" of liability under the statute "have the burden of proving it....[T]hey [a]re not justified in resting on the mere denials of their pleadings" as to the extent of their knowledge, or lack thereof, of the facts by reason of which liability is alleged. Eastwood, 60 Cal. App. 3d at 530-531 (emphasis added).

By their precise terms, California's sections 25504 and 31302 "exempt...controlling persons who '...had no knowledge of or reasonable ground to believe in the existence of facts by reason of which the liability of the controlled person [or entity] is alleged to exist.'" Eastwood, 60 Cal. App. 3d at 531. To invoke their exemption under the statutes, defendants must submit "evidence" which "as a matter of law establishes that [they] had no such knowledge" of the facts by reason of which the liability of the controlled person or entity is alleged to exist. Id. (emphasis added). Section 61-1-22(4), which is worded virtually identically to Cal. Corp. Code §§ 25504 and 31302, is subject to the same analysis. Steenblik, 906 P. 2d at 876.

Whether a fact has been determined "as a matter of law" is reserved for trial. Anderson, 807 P.2d at 827. As noted above, at this stage of the proceedings, "the plaintiff is only required to make a prima facie showing of personal

jurisdiction." Neways, Inc., 950 P.2d at 422. Appellants have set forth allegations and uncontested facts giving rise to claims under section 61-1-22(4), which are therefore sufficient to confer personal jurisdiction over Appellees.

Cases interpreting pleadings standards and personal jurisdiction under the analogous federal securities laws agree. It is "not require[d] that a plaintiff demonstrate that a defendant is liable in order to obtain jurisdiction of him under this statute. That would be to put the cart before the horse. If the suit is to enforce a liability created by the Securities Act, the court has jurisdiction of [sic] the defendant wherever he may be found." San Mateo County Transit District v. Dearman, Fitzgerald & Roberts, Inc., 979 F.2d 1356, 1358 (9th Cir. 1992). This view goes hand-in-hand with the Ninth Circuit's "repudiat[ion]" of the rule of "culpable participation." Id. (holding that "a plaintiff [is] not required to show culpable participation to establish that a defendant was a controlling person" under the federal securities laws) (emphasis in original). Reversing the district court's dismissal of plaintiff's allegations, the Ninth Circuit in San Mateo stated that in light of this "repudiation," "[t]he standard for liability" under the federal securities laws "is lower than the district court thought. Even lower is the standard for personal jurisdiction, which exists if the plaintiff makes a non-frivolous allegation that the defendant controlled a person liable for the fraud." Id. (emphasis added).[11]

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[11] One District Court has disagreed with the 9th Circuit's reasoning in San Mateo, asserting that culpable participation of the defendant officers and directors must be alleged in order to obtain personal jurisdiction over them. See In re Baan Co. Securities Litigation, 81 F. Supp. 2d 75 (D.D.C. 2000). However, San Mateo

Under both state and federal law, therefore, requiring Plaintiffs-Appellants to present proof of Appellees' knowledge or negligence, or allowing Appellees to disprove knowledge at the stage of a jurisdictional motion, would turn the written law on its head. Notably, as discussed further infra, none of the cases cited by Appellees in support of their motions to dismiss, or therefore relied on by the trial court in granting their motions, addresses or even relates to this very problem arising out of the application of the state or federal securities laws. See discussion at Section V.B.3, infra.

Even if the Court were to treat Appellees' submissions as motions to dismiss for failure to state a claim rather than for lack of personal jurisdiction, Defendants' Affidavits do not constitute "proof" as a matter of law that they are exempt from section 61-1-22(4) liability. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177). First, such "proof" is a matter for separate adjudication at a trial on the merits. Anderson, 807 P.2d at 827. Second, even if their statements are accepted as true, Appellees do not contend that they did not or could not reasonably have known of the facts by which the controlled person or entity's liability arose. (RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177). Rather, Defendants' Affidavits are addressed to the question of whether general jurisdiction would have obtained over Defendants-Appellees, and do not address

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remains applicable law in the Ninth Circuit, and there is no circuit-level authority in either the District of Columbia or the Tenth Circuit contradicting it.

statutory liability and defenses under Utah's securities laws at all. Id. Specifically, none of Appellees claim – let alone prove – that they did not know or could not reasonably have known of the facts by reason of which LES' liability may have come to exist under Utah's securities laws. Id. Instead, Appellees testify generally to their lack of personal participation in the Issuance, as well as their lack of residence in Utah. Id. Moreover, a generalized "good faith" defense, including that "the controlling person...did not, directly or indirectly, induce the act, omission, or transaction constituting the violation" is not sufficient to exempt officers and directors from section 61-1-22(4). Compare Utah Code Ann. § 61-1-22(4) (specifically omitting this language from the Uniform Securities Act) with Uniform Securities Act § 605(d) (1985) (amended 1988).

### 3. Appellees' Presumed Activities or Omissions Occurring in or Causing Effects in Utah Confer Specific Personal Jurisdiction Over Them In This Matter

Contrary to Defendants-Appellees' arguments before the trial court, Appellants did not rely on a loose theory that personal jurisdiction over Appellees could obtain based on their "vicarious liability" for the wrongs of the Company, or their mere status as officers and directors of a corporation, without more. See, e.g., RA 0441 (arguing against any "attempt to attribute LES's actions to" Appellees); RA 0350 (citing SII Megadiamond, 969 P.2d at 437); RA 0363 (citing Ten Mile Indus. Park v. Western Plains Serv. Corp., 810 F.2d 1518, 1527 (10th Cir. 1987) (holding that jurisdiction over officers and directors "may not be predicated on jurisdiction over the corporation itself" alone)). Rather, by virtue of

Appellees' liability under the specific statutory language of section 61-1-22(4), Appellants argued that Appellees themselves had committed direct acts or omissions in Utah or having effects in Utah (with respect to the discharge of their duties and responsibilities as an officer or director of a corporate entity) which justified exercising personal jurisdiction over them in a Utah proceeding. (RA 0578, p. 15-16).

One state court has held that "if a corporate officer may be held personally responsible for causing the corporation to act, that act may be imputed to the officer for purposes of establishing personal jurisdiction over him." Seagate Technology v. A.J. Kogyo, Co., 219 Cal. App. 3d 696, 703 (1990) (emphasis added). This is precisely what section 61-1-22(4) accomplishes – by shifting the burden of proof as to an officer's and director's knowledge (or lack thereof) of the facts by reason of which the underlying liability is alleged, the statute presumes the "joint and several" liability of that officer or director as a control person of the liable entity. Utah Code Ann. § 61-1-22(4). Under this reasoning, the acts or omissions of the Company may be imputed to each and every one of the officers and directors for the purpose of establishing personal jurisdiction over them, because section 61-1-22(4) incorporates the presumption that the directors and officers caused the corporation to act as it did. See Ten Mile Indus. Park, 810 F.2d at 1527 (holding that jurisdiction "must be based on [defendants'] individual contacts with the forum state.")

Defendants-Appellees did not address the express language of section 61-1-

22(4), however, nor did they cite any cases in which this section was implicated. Instead, Defendants-Appellees offered cases for the proposition that "vicarious liability" may not attach to the officers and directors of a corporation, and that only evidence of their culpable conduct or omissions giving rise to a cause of action may undergird the court's personal jurisdiction over them. See generally RA 0296-0295 (citing SII Megadiamond, 969 P.2d at 437); RA 0146-0145 (citing, e.g., Ten Mile Indus. Park, 810 F.2d at 1527 ("jurisdiction over the representatives of a corporation may not be predicated on jurisdiction over the corporation itself")); RA 086-085 (same).

None of the cases which Defendants-Appellees cited, and on which the trial court apparently relied, considered a statute such as Utah Code Ann. § 61-1-22(4), which explicitly provides for the liability of officers and directors based precisely on the presumption that such officers and directors acted wrongfully in their control of a liable entity. Id. Rather, these cases involved, inter alia, (1) an attempt by plaintiffs to sue individual officers of out of state company for breach of contract and failure to pay invoices (SII Megadiamond, 969 P.2d at 436); and (2) a suit against an out-of-state corporation and its officers for breach of a loan contract, fraud, and negligence -- i.e., not for securities fraud violations (Ten Mile Indus. Park, 810 F.2d at 1521).

In fact, the exact language of several closely analogous cases supports the exercise of personal jurisdiction over Appellees, when section 61-1-22(4) and its specific presumption of personal liability as to the officers and directors of an

entity liable for securities fraud enters the equation. See, e.g., Seagate Technology, 219 Cal. App. 3d at 703 ("if a corporate officer may be held personally responsible for causing the corporation to act, that act may be imputed to the officer for purposes of establishing personal jurisdiction over him"); United States Ins. Liab. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970) ("Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done"). Where section 61-1-22(4) explicitly provides for the personal liability of corporate officers and directors as control persons at the pleadings stage, thereby imputing the corporation's acts to them individually as control persons, these analogous cases directly support the exercise of personal jurisdiction over these Appellees.

Defendants-Appellees transactions of business in this state provide the basis for asserting specific personal jurisdiction over them, whether it be their presumed activities controlling or directing LES and its agents in the Issuance, or their contracting in this state, through an agent, for a loan (the Loan Agreement) securing the Issuance valued at over $45 million. It is immaterial whether Defendants-Appellees themselves have ever contacted the state. See Utah Code Ann. § 78-27-24 (applying to persons "whether or not a citizen or resident of this state, who in person or through an agent" transacts business in the state or contracts here). LES initiated the Issuance in Utah and could reasonably have been held liable for violation of Utah's securities laws for selling or offering to sell

securities in this state by way of material misrepresentations as to its financial results. (RA 0643-0610, 09). LES's C.F.O. at the time, Paul Humphreys, signed the loan agreement securing the $45 million Issuance. Id. Section 25504 provides for the joint and several liability of officers and directors of an entity so liable, presuming their knowledge and control over the entity's unlawful acts. Utah Code Ann. § 61-1-22(4)). Hence, Appellants have adequately alleged that Appellees engaged in "activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah" sufficient to permit the exercise of personal jurisdiction over them. Harnischfeger Engineers, Inc., 883 F. Supp. at 612.

### C. Personal Jurisdiction Over Appellees for Their Violations of Utah Securities Law Is Reasonable and Comports with Due Process.

In response to a motion to dismiss for lack of personal jurisdiction, a plaintiff must present facts demonstrating that the conduct of defendants related to the pleaded causes is such as to constitute constitutionally cognizable "minimum contacts" justifying the exercise of personal jurisdiction. Miner v. Rubin & Fiorella, LLC, 242 F. Supp. 2d 1043, 1045 (D. Utah 2003). The undisputed facts recited above, together with section 61-1-22(4), establish for pleading purposes the knowing or negligent conduct of Appellees having effects in Utah in violation of Utah's securities laws. Steenblik, 906 P.2d at 876. Further, as discussed below, section 61-1-26 of the Utah Code by its express language effectively gives jurisdiction to the Utah courts in connection with any violation of section 61-1-

22(4) over a corporate officer or director "whether or not he has filed a consent to service of process...and personal jurisdiction over him cannot otherwise be obtained in this state." Utah Code Ann. § 61-1-26.

Appellees bear the burden of demonstrating that such personal jurisdiction would be "unreasonable" – i.e., whether it comports with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310 (1945). Further,

> ...where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable....[I]n undertaking interstate business, [a defendant] must recognize and accommodate...the probability and necessity of litigating in foreign forums.

SII Megadiamond, 969 P.2d at 436 (citing Burger King, 471 U.S. at 477; Synergetics, 701 P.2d at 1111).

In determining reasonableness of jurisdiction, Courts look to the "foreseeability" of a defendant's "being haled into court" in the relevant jurisdiction as a result of the defendant's alleged conduct and contacts with the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Courts may also weigh the interests of the forum state and plaintiff's interest in obtaining relief. Harnischfeger Engineers, Inc., 883 F. Supp. at 615-616.

Appellees cannot reasonably contend that it was unforeseeable that they

could be sued in the state of Utah for securities violations in this state. Forty-two of the fifty states have enacted control person liability provisions incorporating language identical or nearly identical to Utah Code Ann. §61-1-22(4).[12] Further, Utah, along with over thirty other states, has enacted provisions for securing both service of process and personal jurisdiction over out-of-state defendants against whom liability under the state's Blue Sky Laws has been alleged.[13] Utah Code

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[12] Ala. § 8-6-19 (2002); Ariz. Rev. Stat. Ann. § 44-1999(B) (West 2002); Ark. Code Ann. § 23-42-106(c) (1987-2001); Alaska Stat. § 45.55.930(c) (1962-2001); Cal. Corp. Code § 25504; Colo. Rev. Stat. Ann. § 11-51-604(5) (West 2002); Conn. Gen. Stat. Ann. § 36b-29(c) (West 2002); Del. Code Ann. tit. 6, § 7323(b) (1975-2001); D.C. Code Ann. § 31-5607.06.05(c) (2002); Ga. Code Ann. § 10-5-14(c) (2002); Idaho Code § 30-1446(2) (Matthew-Bender 1948-2002); Ind. Code Ann. § 23-2-1-19(d) (West 2002); Iowa Code Ann. § 502.609(2) (West 2002); Kan. Stat. Ann. § 17-1268(b) (2002); Ky. Rev. Stat. Ann. § 292.480(4) (West 2002); La. Rev. Stat. Ann. § 51:714 (West 2002); Me. Rev. Stat. tit. 32, § 10605(3) (West 2002); Md. Code Ann. Corporations and Associations, § 11-703(c) (West 2002); Mass. Gen. Laws Ann. ch. 110A § 410(b) (West 2002); Mich. Comp. Laws Ann. § 451.810(b) (West 2002); Minn. Stat. Ann. § 80A.27.3 (West 2002); Miss. Code Ann. § 75-71-719 (West 2002); Mo. Ann. Stat. § 409.411(c) (West 2002); Mont. Code Ann. § 30-10-307(2) (2001); Nev. Rev. Stat. Ann. § 90.660(4) (West 2002); N.H. Rev. Stat. Ann. § 421-B:25(III) (West 2002); N.J. Stat. Ann. § 49:3-71(d) (West 2002); N.M. Stat. Ann. § 58-13B-40(F) (1978-2001); N.C. Gen. Stat. § 78A-56(c) (West 2002); Okla. Stat. Ann. tit. 71, § 408 (West 2002); Or. Rev. Stat. § 59.115(3) (2001); Pa. Stat. Ann. tit. 70, § 1-503(a) (West 2002); R.I. Gen. Laws § 7-11-605(d) (1953-2001); S.C. Code Ann. § 35-1-1500 (2002); S.D. Codified Laws § 47-31A-410(c) (1968-2002); Tenn. Code Ann. § 48-2-122(g) (West 2002); Tex. Rev. Civ. Stat. Ann. § 581-33(F) (West 2002); Vt. Stat. Ann. tit. 9, § 4240(f) (2001); Va. Code Ann. § 13.1-522(c) (West 2002); Wash. Rev. Code § 21.20.430(3) (West 2002); W. Va. Code § 32-4-410(b) (1966-2002); Wis. Stat. Ann. § 551.59(4) (West 2002); Wyo. Stat. § 17-4-122(6) (1977-2001).

[13] The following statutes incorporate language nearly identical to section 61-1-26, permitting personal jurisdiction over non-residents whose conduct violates the state's securities laws: Alaska Stat. § 45.55.980(h) (1962-2001); Ark. Code Ann. § 23-42-107(b) (1987-2001); Cal. Corp. Code § 25550; Conn. Gen.

Ann. § 61-1-26 (discussed infra). Both of these statutes are patterned after similar provisions in the Uniform Securities Act, which was first recommended for adoption by the National Conference of Commissioners on Uniform State Laws and the ABA in August of 1956, and were themselves first adopted in Utah shortly thereafter. See, e.g. Uniform Securities Act §§ 605, 606 (1985) (amended 1988); Utah Code Ann. § 61-1-1 et seq.

At a minimum, it conforms with fair play and substantial justice for Appellees, as officers and directors of the entity that initiated the issuance of over $45 million worth of securities in Utah, to bear the burden of proving that they did not and reasonably could not have known of the facts surrounding LES's alleged liability, including the accounting fraud giving rise to material misstatements in the Issuance. The parties are long from the trial stage, and Appellees are not currently under any threat of judgment being entered against them; rather,

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Stat. Ann. § 36b-33(h) (West 2002); Del. Code Ann. tit. 6, § 7327 (1975-2001); D.C. Code Ann. § 31-5607.06(c) (2002); Iowa Code Ann. § 502.609(2) (West 2002); Ky. Rev. Stat. Ann. § 292.430(3) (West 2002); Md. Code Ann. Corporations and Associations, § 11-802(b) (West 2002); Mass. Gen. Laws Ann. ch. 110A § 414(h) (West 2002); Mich. Comp. Laws Ann. § 451.814(h) (West 2002); Minn. Stat. Ann. § 80A.27.8 (West 2002); Miss. Code Ann. § 75-71-703 (West 2002); Mo. Ann. Stat. § 409.415(h) (West 2002); Nev. Rev. Stat. Ann. 90.770(4) (West 2002); N.H. Rev. Stat. Ann. § 421-B:30(VIII) (West 2002); N.J. Stat. Ann. § 49:3-73(b) (West 2002); N.M. Stat. Ann. § 58-13B-50(C) (1978-2001); N.C. Gen. Stat. § 78A-63(g) (West 2002); N.D. Cent. Code § 10-04-14(2) (Matthew Bender 1999-2001); Okla. Stat. Ann. tit. 71, § 413 (West 2002); R.I. Gen. Laws § 7-11-708(c) (1953-2001); S.C. Code Ann. § 35-1-1420 (2002); S.D. Codified Laws § 47-31A-414 (1968-2002); Tenn. Code Ann. § 48-2-124 (West 2002); Vt. Stat. Ann. tit. 9, § 4236 (2001); W. Va. Code § 32-4-414(h) (1966-2002); Wis. Stat. Ann. § 553.73 (West 2002); Wyo. Stat. § 17-4-126 (1977-2001).

Appellants are simply demanding their day in court, in order for the fact-finder to have an opportunity to examine any "proof" to be submitted by Appellees in support of their exemption from section 61-1-22(4). Utah's interest in the matter is highlighted by its enactment of a provision expressly providing for service of process and personal jurisdiction over non-resident defendants who may be liable for state securities law violations (Utah Code Ann. § 61-1-26), as well as the Utah Supreme Court's observation that Utah's securities laws "deviate from" their federal securities law analogs "by expressly imposing liability on every partner, officer, director, or the like." Steenblik, 906 P.2d at 876.

### 1. Section 61-1-26 of the Utah Code Grants Utah Courts Personal Jurisdiction to Enforce the Securities Laws.

Without a means of acquiring jurisdiction over those who violate Utah's securities laws, the laws would be nothing more than an empty threat. Instead, the Utah legislature in enacting section 61-1-26 of the Utah Code recognized the national nature of the securities markets and the common situation where a defendant acts outside of Utah, in violation of Utah's securities laws, and causes an effect within the state's borders. Section 61-1-26 directly addresses this situation and enables the state to obtain jurisdiction over a non-resident defendant in a manner consistent with federal constitutional due process requirements.

Utah Code Ann. § 61-1-26(8)(a) provides as follows:

> When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of

> process ... and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

(emphasis added). As noted supra, the equivalent of section 61-1-26 has been adopted by more than thirty of the fifty states. See FN 13.

This section, as made clear by its express language, sets forth "a special means of brining into court one who violates the Securities Act," to be used "[w]hen personal jurisdiction over [the defendant] cannot otherwise be obtained." Piantes v. Hayden-Stone, Inc., 514 P.2d 529 (Utah 1973). It enables a plaintiff to avoid the inconvenience and expense that might be encountered in having to sue different defendants involved in the same scheme in different jurisdictions or, in the case of a resident plaintiff, in having to pursue claims in a foreign jurisdiction. See id. Other states have interpreted their analogous statutes to ensure that their courts will be able to hear and adjudicate claims brought under their securities laws, since a "foreign court may not be as hospitable to the enforcement of a [state's] Securities Law as [that state's] court would be." See, e.g., Marsh & Volk, California Securities Laws, § 14.12[2], at 14-76.

In a case that is directly on point, Massachusetts has interpreted this same provision in a Massachusetts' statute, M.G.L. 110A § 414(h), as extending

jurisdiction over an individual who claimed that he had done no act and had engaged in no conduct within the jurisdiction of the state. The court found that because the individual defendant was charged with liability for his acts or inaction under the state's controlling person liability statute, the equivalent of Utah's section 61-1-22(4), he had engaged in conduct prohibited or made actionable by the state's securities laws such that the court could exercise jurisdiction over him pursuant to M.G.L. 110A § 414(h). See American Microtel, Inc. v. Massachusetts, 1995 WL 809575, *10-11 (Mass. Super. Jan. 27, 1995).

Further, in Brown v. Investment Management and Research, Inc., 323 S.C. 395 (1996) , the South Carolina Supreme Court interpreted a statutory provision identical to Utah Code Ann. § 61-1-26(8) to mean that violations of that state's securities provisions "as a matter of law...submitted [Appellees] to personal jurisdiction in South Carolina." Id. at 401.

**a. One Case Which Appears to Hold that Control Person Liability Under an Analogous State Securities Regimen Does Not Confer Jurisdiction is Highly Distinguishable.**

One reported case, from Kansas, ostensibly held that a control person's presumptive liability under a state securities law analogous to section 61-1-22(4) is not sufficient to confer personal jurisdiction. Schlatter v. Mo-Comm Futures, Ltd., 662 P.2d 553 (Kan. 1983). The trial court erroneously stated that that case was "exactly like" the present case. (RA 0578, p. 15). This is incorrect. Schlatter is distinguishable on several grounds from the present case, and even the court

acknowledged that the question of jurisdiction in that case was "difficult." Schlatter, 662 P.2d at 557. In Schlatter, the jurisdictional motions were heard and decided at the same time as plaintiffs' motion for summary judgment. Thus, the court had available and considered an extensive factual record relevant to issues of ultimate liability in the case. With this record, the court also found that there was no evidence suggesting that the defendants had engaged in any conduct that would have brought them within Kansas' long-arm statute. Indeed, the record before the court showed that the defendants "were not actively engaged in any of the management decisions of the corporation," "did not attend any directors' meetings," were not "aware that the limited partnership interests were being sold in Kansas," and took no "steps to participate in the affairs of the corporation or to fulfill their duties as directors." Id. at 559. Based on this record, the court framed the issue:

> Does it follow that defendants, as name-only, non-participating directors, have transacted business within the State of Kansas or committed a tortious act within the state? We think not. . . . While the defendants were lax in not assuming their duties as directors and in allowing their appointment and continuation as directors when they obviously had no control or say in the management of the corporation, we cannot say that such nonfeasance constitutes the doing of business or commission of a tortious act in Kansas. . . . [The defendants] had no contact whatsoever in connection with the activities of Mo-Comm Futures, Inc., in selling the limited partnership interests in Kansas. While their total failure to assume any of the duties of a director of Mo-Comm Futures, Inc., may constitute a breach of their fiduciary duty to the corporation and its stockholders [citation omitted], such nonfeasance in

> office cannot be the basis of subjecting them to in personam jurisdiction in Kansas solely because the corporation transacted business or committed tortious acts in Kansas.

Id. at 560-63. Under these circumstances, the court found that the defendants had not "acted within [the] state as a director, transacted business in Kansas, or committed a tortious act in Kansas . . ." Id. at 563. Importantly, Kansas' purported analog to Utah Code Ann. § 61-1-22(4), quoted by the Kansas Supreme Court in its decision, is materially different from the Utah statute in both its language and the scope of liability (and therefore the acts presumed to have been undertaken by officers and directors of a liable entity or its agents which give rise to personal jurisdiction). Kan. Stat. Ann. § 17-1268(b) provides, in part, that "every partner, officer, or director...who materially aids in the sale" of securities in violation of Kansas law is jointly and severally liable with the seller of securities. Schlatter, 233 Kan. at 337. Thus, the Kansas court observed, that though "the statute establishes the basis of liability of persons involved in the sale of unregistered securities,...it does not establish the jurisdiction of the court to submit such persons to liability." Id. Utah's statute is fundamentally different, in that it does not require that plaintiffs demonstrate that officers and directors were "involved in the sale" of securities, but instead places the onus on such officers and directors to prove that they did not know of the existence of facts giving rise to the underlying liability. See Steenblik, 906 P.2d at 876.

Finally, the court's reasoning regarding jurisdiction and liability under

Kansas' control person liability statute must be limited to the circumstances of that case. The Schlatter court failed to review a single case discussing the requisite showing of "control" or standard for liability under the statute and failed to consider cases holding that the ability to exercise, rather than the actual exercise, of control is enough. McNamara v. Bre-X Minerals Ltd., 46 F. Supp. 2d 628, 638 (E.D. Tex. 1999). Instead, the court fell back on the extensive factual record before it and the evidence in that record demonstrating that defendants had wholly abdicated all of their director duties. In addition, Kansas' securities laws lack the equivalent of Utah's section 61-1-26, so conduct by a non-resident that violates the state's securities laws is not equated with consent to be sued within the state and will not subject that individual to jurisdiction. See Kan. Stat. Ann. § 17-1263. For these reasons, the Schlatter holding conflicts with other decisions which find jurisdiction based on allegations of control person liability. See, e.g., McNamara, 46 F. Supp. 2d at 628.

### 2. The Interplay of the Equivalent Federal Statutes Confer Personal Jurisdiction in this Type of Situation.

Federal courts confront the same jurisdictional question when determining whether they can exercise personal jurisdiction over foreign director and officer defendants whose only liability for the wrongful conduct arises out of their participation as "control persons." The federal control person statute, section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), is analogous to Utah's section 61-1-22(4) – with the exception that it permits a "good faith"

defense to defendants, which is an easier standard for defendants to meet than that of the Utah statute.[14] The Ninth Circuit has held that it is "clear that in an action based on section 20(a) (of the Securities Exchange Act), the defendant who is a controlling person, and not the plaintiff, bears the burden of proof as to defendant's good faith." Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990) (see also Howard v. Everex, 228 F.3d 1057, 1065 (9th Cir. 2000)) (holding that "[p]laintiff need not show that the defendant was a culpable participant in the violation, but defendant may assert a 'good faith' defense").

Like the Utah code, the federal securities laws explicitly provide for personal jurisdiction over defendants who are not present in the forum – which in the federal context, may mean the United States.[15] See 15 U.S.C.A. § 78aa; see also Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (finding that Congress meant to meant to assert personal jurisdiction over foreigners not present in the United States to boundaries of due

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[14] Section 20(a) provides: "Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

[15] 15 U.S.C.A. § 78aa provides that the district courts of the United States "shall have exclusive jurisdiction of violations of [the Securities Exchange] Act," and continues on as follows:

> "Any suit or action to enforce any liability or duty created by this Act or rules and regulations thereunder...may be brought in any such district...and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

process). Thus, in determining whether personal jurisdiction can be exercised over a foreign defendant alleged to be liable only as a control person, federal courts ask and answer the same questions as were presented to the trial court, regarding the necessary showing by the plaintiff and the requisite contacts between the defendant and the forum.

A number of federal courts which have analyzed the question of personal jurisdiction over foreign or non-U.S. resident defendants based on the complaint's allegations of control person liability under section 20(a) have found personal jurisdiction to exist. For instance, in McNamara, 46 F. Supp. 2d at 628, the court held that control person liability under section 20(a) automatically encompasses a jurisdictional inquiry and rejected the notion that it must engage in a separate minimum contacts analysis. Id. at 636. The court found that it could exercise personal jurisdiction over the foreign officers and directors based on plaintiffs' "prima facie" showing that they were control persons under the Fifth Circuit test, meaning that they "possessed the power to control [directly or indirectly] the specific transaction or activity upon which the primary violation is predicated," whether or not they exercised such power. Id. at 638.

In Derenis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003 (D.N.J. 1996), the court held that it had personal jurisdiction over two foreign directors. The complaint alleged that these two defendants were directors and members of the audit committee and that they had reviewed and approved misleading financial statements and public disclosures. The court found that these

allegations at the pleading stage adequately pled control person liability under the Third Circuit's culpable participation test – a test which actually has been rejected in the Ninth and Tenth Circuits as imposing an impermissible burden on plaintiffs. Id. at 1013-14; cf. San Mateo County Transit District, 979 F.2d at 1358; San Francisco-Oklahoma Petroleum Exploration Corp. v. Carstan Oil Co., Inc., 765 F.2d 962, 964-65 (10th Cir. 1985). The court also held that they constituted a prima facie showing that the foreign directors were controlling persons who knew that the allegedly misleading financial statements would affect the company's stock price in the United States. Id. at 1014. Jurisdiction could be properly exercised over them on this basis.

Similarly, in Landry v. Price Waterhouse Chartered Accountants, 715 F. Supp. 98 (S.D.N.Y. 1989), the court found that it could exercise personal jurisdiction over a foreign director based on plaintiffs' prima facie showing that he was a "control person" within the meaning of section 20(a). The complaint's allegations of his shareholder and director status, coupled with an allegation that he knew or should have known that the wrongful conduct would have an impact on the value of the company's stock, were sufficient. Id. at 102. The court found that such showing satisfied due process requirements that the foreign defendant both caused an effect in the United States and should have reasonably anticipated being haled into court in the United States. Id. at 101-2.

In each of these cases, the courts equated the complaint's allegations – regarding the foreign directors' and officers' ability to control, either directly or

indirectly, the corporate entity charged with violating the federal securities laws and without proof that such control had been exercised – with the foreign defendants' having caused an effect in the United States and having knowledge that the alleged wrongful corporate acts would have an effect on the corporation's stock price in the United States. The result should be no different under Utah law. Appellants' allegations regarding Appellees' control person liability, coupled with the express language of section 61-1-22(4) of the Utah Code, should confer personal jurisdiction over them.

### 3. Granting Appellees' Motions to Dismiss Would Promote an Absurd Result.

Appellees have not claimed that service of process or notice of the pending action was defective. Hence, one of the principal concerns of the service provisions – notice of the pending action – has been met. This same concern underlies Utah Code Ann. § 61-1-26, which was designed – along with all other provisions similarly modeled after the Uniform Securities Act – to provide a means for securing notice of the pending action where other alternatives are unavailable. Utah Code Ann. § 61-1-26; see also Marsh & Volk, California Securities Laws, § 14.12[2], at 14-76 (interpreting identical California statute).

Appellees have instead moved to dismiss the Complaint based on their lack of substantial contacts with the state, as well as their lack of personal involvement in the Issuance. See RA 027-024, 032-028, 037-033, 0164-0162, 0167-0165, 0170-0168, 0173-0171, 0176-0174, 0179-0177. However, as noted above, such

casual defenses do not meet the burden imposed by the Utah securities laws to exempt directors and officers from their liability as controlling persons. Prior to raising and proving such a defense, Appellees are presumed by the statute to have knowingly or negligently committed a tort having effects in this state, thereby satisfying the "minimum contacts" test for personal jurisdiction. Utah Code Ann. § 61-1-22(4)) (see discussion in Section V.B, supra). Plaintiffs-Appellants expressly are not required to prove Appellees' "culpable participation" in the controlled person's or entity's tort in order for Appellees' knowing or negligent acts to be presumed. Steenblik, 906 P.2d at 876. Further, as noted above, Appellants have no burden to prove the truth of the allegations of Complaint because Appellees have not moved to dismiss the Complaint for failure to state a claim. Lastly, Utah's securities laws (modeled after the widely-adopted Uniform Securities Act) expressly provide for service of process and personal jurisdiction over non-resident defendants who may be liable for violating the state's securities statutes. Utah Code Ann. § 61-1-26.

Granting Appellees' motions to dismiss therefore threatens to impose an absurd result. Requiring Appellants to submit additional evidence or declarations to support the uncontested facts and liability already submitted both contradicts the express provisions of Utah's securities statutes, and defeats the intent of these statutes and the Uniform Securities Act to promote full enforcement of the various states' securities laws and to protect the local investor. That there is so little caselaw directly addressing the present scenario, whereby a corporation's officers

and directors move to dismiss a complaint sounding in state securities law for lack of personal jurisdiction, may speak to the inconsistency of the reasoning employed by the trial court. Much more precedent exists on the question of whether plaintiffs such as Appellants have stated a cause of action under those or analogous laws, for the purpose of deciding a demurrer or satisfying summary judgment. See generally Steenblik, 906 P.2d at 879; Sherman v. Lloyd, 181 Cal. App. 3d 693 (1986); Bowden v. Robinson, 67 Cal. App. 3d 705 (1977) (reversing summary judgment in favor of officers and directors); Eastwood, 60 Cal. App. 3d at 530-53; The Neptune Society Corporation, 194 Cal. App. 3d at 1233 (1987). This fact squares with the express language of the securities statutes, which (a) require fact-finding into the controlling persons' knowledge or intent prior to a final determination of their liability under statutes such as section 61-1-22(4) and (b) confer personal jurisdiction over such defendants precisely in order to determine that question.

## VI. CONCLUSION

For the foregoing reasons, the trial court erred in finding that Appellees were not subject to personal jurisdiction in the state of Utah for their alleged violations of Utah's securities laws. The trial court's finding was at a minimum premature and inappropriate at the pleadings stage, absent complete factual adjudication on the extent of Appellees' knowledge of the facts giving rise to the liability asserted by Appellants. The judgment of the trial court should be reversed, and Appellees' collective motions to dismiss the Complaint denied.

## VII. ADDENDUM

An Addendum is attached as pages A-1 to A-14, pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure.

Dated: April 25, 2003

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**UTAH CODE, 1953**
**TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION**
**CHAPTER 1. UTAH UNIFORM SECURITIES ACT**



Current through the 2002 5th Special Session

61-1-1 Fraud unlawful.

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) employ any device, scheme, or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

History: C. 1953, 61-1-1, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 4.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. --Sections 61-1-1 to 61-1-41 (L. 1925, ch. 87, § § 1 to 10, 10x, 11 to 18, 20 to 27; 1927, ch. 59, § 1; 1929, ch. 79, § 1; R. S. 1933, 82-1-1 to 82-1-41; L. 1941 (1st S. S.), ch. 29, § § 1, 2; C. 1943, 82-1-1 to 82-1-41; L. 1957, ch. 129, § 1; 1961, ch. 149, § 1), relating to the state securities commission, were repealed by Laws 1963, ch. 145, § 1 (see § 61-1- 30). Present § § 61-1-1 to 61-1-30 were enacted by § 1 of the act.

Comparable Provisions.--Ariz. Rev. Stat. § 44-1801 et seq.

Colo. Rev. Stat. Title 11, Art. 51.

Idaho Code § 30-1401 et seq.

New Mexico Stat. Anno. § 58-13B-1 et seq.

Nev. Rev. Stat. Chapter 90.

Wyo. Stat. § 17-4-101 et seq.

Cross-References. --Criminal Code, corporation frauds, § 76-10-701 et seq.

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Expert testimony.

The trial court did not err in allowing a securities expert to testify as to the "materiality" of information defendant allegedly had omitted from securities-related documents, and the expert's limited use of the word "material" did not mandate the conclusion that he was improperly instructing the jury on the law. State v. Larsen, 865 P.2d 1355 (Utah 1993).

Financial records.

Admitting a defendant's financial records in violation of the Financial Information Privacy Act (§ 78-27-45 et seq.) was reversible error. State v. Waite, 803 P.2d 1279 (Utah Ct. App. 1990).

Finding of fraud.

Defendant's concealing from his employer, a licensed broker dealer, unauthorized sales of investments and his affirmative misrepresentions regarding his actions harmed his employer by loss of commissions and by exposure to potential lawsuits by disgruntled investors, and such fraud on the employer was sufficient to invoke this section. State v. Harry, 873 P.2d 1149 (Utah Ct. App. 1994).

Instructions.

Even though instructions outlined three possible alternative acts required for the crime of securities fraud and did not require jury unanimity as to a specific act, there was no plain error as long as each juror believed, beyond a reasonable doubt, that at least one prohibited act occurred. State v. Tenney, 913 P.2d 750 (Utah Ct. App. 1996).

Intent to defraud.

A scheme to defraud need not come to fruition in order to constitute a crime under the securities laws; the offense is complete when a device, scheme or artifice is used with intent to defraud. State v. Facer, 552 P.2d 110 (Utah 1976).

The trial court properly instructed the jury that the culpable mental state for

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**UTAH CODE, 1953**
**TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION**
**CHAPTER 1. UTAH UNIFORM SECURITIES ACT**



Current through the 2002 5th Special Session

61-1-22 Sales and purchases in violation --Remedies --Limitation of actions.

(1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1), Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61- 1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

(b) Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts, all as specified in Subsection (1) upon a showing that the violation was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1- 1(2) is not liable under Subsection (1)(a) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4) (a) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(b) There is contribution as in cases of contract among the several persons so liable.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) A cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(7) (a) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the

plaintiff of the facts constituting the violation, whichever expires first.

(b) No person may sue under this section if:

(i) the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt; or

(ii) the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

(8) No person who has made or engaged in the performance of any contract in violation of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(9) A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void.

(10) (a) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity.

(b) This chapter does not create any cause of action not specified in this section or Subsection 61-1-4(6).

History: C. 1953, 61-1-22, enacted by L. 1963, ch. 145, § 1; 1979, ch. 218, § 7; 1983, ch. 284, § 32; 1986, ch. 107, § 2; 1990, ch. 133, § 15; 1991, ch. 161, § 14; 1998, ch. 13, § 62.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1998 amendment, effective May 4, 1998, substituted "Subsection 61-1-4(6)" for "Subsection 61-1-4(5)" in Subsection (10)(b).

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**UTAH CODE, 1953**
**TITLE 61. SECURITIES DIVISION --REAL ESTATE DIVISION**
**CHAPTER 1. UTAH UNIFORM SECURITIES ACT**



Current through the 2002 5th Special Session

61-1-26 Scope of the act --Service of process.

(1) Section 61-1-1, Subsection 61-1-3(1), Sections 61-1-7, 61-1-15.5, 61-1- 17, and 61-1-22 apply to persons who sell or offer to sell when:

(a) an offer to sell is made in this state; or

(b) an offer to buy is made and accepted in this state.

(2) Section 61-1-1, Subsection 61-1-3(1), and Section 61-1-17 apply to persons who buy or offer to buy when:

(a) an offer to buy is made in this state; or

(b) an offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state whether or not either party is then present in this state, when the offer:

(a) originates from this state; or

(b) is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

(4) For the purposes of this section, an offer to sell or to buy is accepted in this state when acceptance:

(a) is communicated to the offeror in this state; and

(b) has not previously been communicated to the offeror, orally or in writing, outside this state, and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when:

(a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than 2/3 of its circulation outside this state during the past 12 months; or

(b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting

prohibited conduct is done in this state, whether or not either party is then present in this state.

(7) (a) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it prescribes by rule, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent.

(b) A person who has filed such a consent in connection with a previous registration or notice filing need not file another.

(c) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) (a) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally.

(b) Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last-known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

History: C. 1953, 61-1-26, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 36; 1990, ch. 133, § 17; 1992, ch. 216, § 6; 1997, ch. 160, § 11.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1997 amendment, effective May 5, 1997, inserted "61-1-

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**UTAH CODE, 1953**
**TITLE 78. JUDICIAL CODE**
**PART III. Procedure**
**CHAPTER 27. MISCELLANEOUS PROVISIONS**



Current through the 2002 5th Special Session

78-27-22 Jurisdiction over nonresidents --Purpose of provision.

It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

History: L. 1969, ch. 246, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Meaning of 'this act'. --The term "this act," in the second paragraph, means Laws 1969, ch. 246, which enacted § § 78-27-22 to 78-27-28.

Cross-References. --Foreign corporations, registered office and agent, § 16- 10a-1508.

Foreign fraternals, service of process upon commissioner, § 31A-14-203.

Nonresident motorists, long-arm provision, § 41-12a-403.

Service of process, Rules of Civil Procedure, Rule 4.

NOTES TO DECISIONS

ANALYSIS

Implementation.
Minimum contacts.
-- Transacting business.

C

**UTAH CODE, 1953**
**TITLE 78. JUDICIAL CODE**
**PART III. Procedure**
**CHAPTER 27. MISCELLANEOUS PROVISIONS**



Current through the 2002 5th Special Session

78-27-23 Jurisdiction over nonresidents --Definitions.

As used in this act:

(1) The words "any person" mean any individual, firm, company, association, or corporation.

(2) The words "transaction of business within this state" mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah.

History: L. 1969, ch. 246, § 2.

NOTES, REFERENCES, AND ANNOTATIONS

Meaning of 'this act'. --See note following same catchline in notes to § 78- 27-22.

NOTES TO DECISIONS

ANALYSIS

Nonresident plaintiff.
Transaction of business.
Cited.

Nonresident plaintiff.

Foreign corporation lawfully authorized to do business in the state of Utah is a business within the state of Utah and entitled to the protection of § § 78- 27-22 to 78-27-28. Hughes Tool Co. v. Meier, 486 F.2d 593 (10th Cir. 1973).

Transaction of business.

The long-arm statute grants personal jurisdiction over claims arising out of any business transaction within the state, regardless of whether it is related to the

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**UTAH CODE, 1953**
**TITLE 78. JUDICIAL CODE**
**PART III. Procedure**
**CHAPTER 27. MISCELLANEOUS PROVISIONS**



Current through the 2002 5th Special Session

78-27-24 Jurisdiction over nonresidents --Acts submitting person to jurisdiction.

Any person, notwithstanding Section 16-10a-1501, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising out of or related to:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

History: L. 1969, ch. 246, § 3; 1983, ch. 160, § 1; 1987, ch. 35, § 1; 1992, ch. 277, § 247; 1998, ch. 120, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1998 amendment, effective May 4, 1998, substituted "arising out of or related to" for "arising from" at the end of the introductory paragraph.

NOTES TO DECISIONS

**WEST'S ANNOTATED CALIFORNIA CODES**
**CORPORATIONS CODE**
**TITLE 4. SECURITIES**
**DIVISION 1. CORPORATE SECURITIES LAW OF 1968**
**PART 6. ENFORCEMENT**
**CHAPTER 1. CIVIL LIABILITY**



Current through Ch. 3 of 2003-04 Reg.Sess. urgency legislation,
Ch. 4 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 25504. Joint and several liability of other persons, partners, etc., with persons liable under section 25501 or 25503

Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

CREDIT(S)

1977 Main Volume

(Added by Stats.1968, c. 88, p. 281, § 2, operative Jan. 2, 1969.)

<General Materials (GM) - References, Annotations, or Tables>

## HISTORICAL AND STATUTORY NOTES

1977 Main Volume

Former § 25504, which related to contents of application required of corporate applicant, added by Stats.1949, c. 384, p. 708, § 1, was repealed by Stats.1968, c. 88, p. 243, § 1, operative Jan. 2, 1969 and was derived from Stats.1917, c. 532, p. 675, § 3; Stats.1931, c. 423, p. 941, § 2; Stats.1941, c. 615, p. 2064, § 1.

## LAW REVIEW AND JOURNAL COMMENTARIES

Collateral participant liability under state securities laws. Douglas M. Branson, 19 Pepp.L.Rev. 1027 (1992).

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**WEST'S ANNOTATED CALIFORNIA CODES**
**CORPORATIONS CODE**
**TITLE 4. SECURITIES**
**DIVISION 5. FRANCHISE INVESTMENT LAW**
**PART 4. ENFORCEMENT**
**CHAPTER 1. CIVIL LIABILITY**



Current through Ch. 3 of 2003-04 Reg.Sess. urgency legislation,
Ch. 4 of 1st Ex.Sess. urgency legislation, & Ch. 1 of 2nd Ex.Sess.

§ 31302. Persons connected with sale or offer; joint and several liability

Every person who directly or indirectly controls a person liable under Section 31300 or 31301, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

CREDIT(S)

1977 Main Volume

(Added by Stats.1970, c. 1400, p. 2657, § 3, operative Jan. 1, 1971.)

<General Materials (GM) - References, Annotations, or Tables>

LIBRARY REFERENCES

1977 Main Volume

**ALR Library**
Vicarious liability of private franchisor. 81 ALR3d 764.

**Legal Jurisprudences**
Cal Jur 3d Franch Contr § § 33, 34; Franch Priv § 61.
62 Am Jur 2d Private Franchise Contracts § § 15-17.

**Treatises and Practice Aids**
Witkin, Summary (9th ed) Corp § 288.

**Forms**
B-W Cal Civil Practice: Business Litigation § 23:14.
Cal Transactions Forms: Business Transactions § § 1:23, 1:24.

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**KANSAS STATUTES ANNOTATED**
**CHAPTER 17.--CORPORATIONS**
**ARTICLE 12.--SECURITIES**
**KANSAS SECURITIES ACT**



Current through the 2002 Regular Session

17-1268. Civil liabilities.

(a) Any person, who offers or sells a security in violation of K.S.A. 17- 1254 or 17-1255, and amendments thereto, or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading (the buyer not knowing of the untruth or omission) and who does not sustain the burden of proof that such person did not know and in the exercise of reasonable care could not have known of the untruth or omission, is liable to the person buying the security from such person, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 15% per annum from the date of payment, costs, and reasonable attorney fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the buyer no longer owns the security. Damages are the amount that would be recoverable upon a tender less:

(1) The value of the security when the buyer disposed of it; and (2) interest at 15% per annum from the date of disposition.

(b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that such nonseller did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(c) Any tender specified in this section may be made at any time before entry of judgment. Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant. No person may sue under this section if:

(1) The buyer received a written offer, before suit and at a time when the buyer owned the security, to refund the consideration paid, together with interest at 15% per annum from the date of payment, less the amount of any income received on the security, and the buyer failed to accept the offer within 30 days of its receipt; or (2) the buyer received such an offer before suit and at a time when the buyer did not own the security, unless the buyer rejected the offer in writing within 30 days of its receipt.

(d) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule and regulation or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance wasin violation, may base any suit on the contract. Any condition, stipulation, or provision binding any person acquiring any security or receiving any investment advice to waive compliance with any provision of this act or any rule and regulation or order hereunder is void.

**History:** L. 1957, ch. 145, § 17; L. 1967, ch. 122, § 4; L. 1979, ch. 61, § 6; L. 1982, ch. 100, § 1; L. 1997, ch. 62, § 10; July 1.

<General Materials (GM) - References, Annotations, or Tables>

RESEARCH AND PRACTICE AIDS

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Securities Regulation 291 et seq.

C.J.S. Securities Regulation § § 228, 237.

**LAW REVIEW AND BAR JOURNAL REFERENCES:**

2002 Pocket Part LAW REVIEW AND BAR JOURNAL REFERENCES:

"Negligence: Protecting Investors By Forcing Brokerage Firms to Disclose Employees' Misconduct [Palmer v. Shearson Lehman Hutton, Inc., 622 So. 2d 1085 (Fla. Dist. Ct. App. 1993)]," Arthur E. Rhodes, 34 W.L.J. 628, 640, 641 (1995).

"Caveat plaintiff: Congress has defederalized private securities litigation," Steven A. Ramirez, 67 J.K.B.A. No. 9, 16 (1998).

1995 Main Volume LAW REVIEW AND BAR JOURNAL REFERENCES:

Shareholder liability for watered stock, 8 K.L.R. 644, 655 (1960).

Mentioned as a remedy for damages incurred in pyramid or founder-member investment operations, 22 K.L.R. 55, 63 (1973).

"Securities Registration Under the Kansas Securities Act," Fred B. Lovitch, 22 K.L.R. 565, 566 (1974).

"Recovery of Attorney Fees in Kansas," Mark A. Furney, 18 W.L.J. 535, 557 (1979).

"Legal Framework Governing the Kansas Non-Profit Corporation-Part II," Fred Lovitch, 48 J.B.A.K. 343, 353 (1979).

"Securities And Commodities Arbitration In Kansas," Diane Nygaard, 58 J.K.B.A. No. 10, 21, 22 (1989).

**CASE ANNOTATIONS**

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**UNITED STATES CODE ANNOTATED**
**TITLE 15. COMMERCE AND TRADE**
**CHAPTER 2B--SECURITIES EXCHANGES**



Current through P.L. 108-10, approved 03-11-03

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

CREDIT(S)

1997 Main Volume

(June 6, 1934, c. 404, Title I, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Dec. 4, 1987, Pub.L. 100-181, Title III, § 326, 101 Stat. 1259.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1949 Acts. Senate Report No. 303 and House Report No. 352, see 1949 U.S. Code Cong. Service, p. 1248.

1987 Acts. Senate Report No. 100-105, see 1987 U.S. Code Cong. and Adm. News, p. 2089.

References in Text

This chapter, referred to in text, in the original read "this title". See References in Text note set out under § 78a of this title.

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**IN THE UTAH SUPREME COURT**

MFS SERIES TRUST III (on behalf of MFS MUNICIPAL HIGH INCOME FUND), MERRILL LYNCH HIGH YIELD MUNICIPAL BOND FUND, INC., MUNIHOLDINGS FUND, INC., MERRILL LYNCH MUNICIPAL BOND FUND, THE NATIONAL PORTFOLIO, MERRILL LYNCH MUNICIPAL STRATEGY FUND, EATON VANCE DISTRIBUTORS, INC., T. ROWE PRICE ASSOCIATES, INC., JOHN HANCOCK FUNDS, INC., AND PUTNAM INVESTMENTS, INC.,

Plaintiffs/Appellants,

v.

KENNETH W. WINGER, JOHN R. GRAINGER, JAMES R. BULLOCK, PAUL R. HUMPHREYS, JOHN W. ROLLINS, JR., JOHN W. ROLLINS, SR., LESLIE W. HAWORTH, DAVID B. THOMAS, JR., HENRY B. TIPPIE, JAMES L. WAREHAM, GROVER C. WRENN, MICHAEL J. BRAGAGNOLO, and HENRY H. TAYLOR,

Defendants/Appellees.

**CERTIFICATE OF SERVICE**

Trial Court Case No: 01-300722 MI

Appellate Court No. 20020719

This is to certify that two (2) copies of

1. Brief of Appellants

was served by First Class Mail this 25th day of April, 2003, pursuant to Rule 26 of the Utah Rules of Appellate Procedure, on each of the following counsel at the addresses below:

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